

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 90-5

May 1, 1990

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Matters Raised by the ABA Practice and Procedure
Committee at the 1990 Mid-Winter Meeting

The Board, the General Counsel, and the Agency Liaison Committee recently met with the ABA Labor Law Section Subcommittee on NLRB Practice and Procedure. A number of items were raised, many of which involve Regional Office operations. Listed below are the questions raised and our responses. I invite and welcome any comments you may have on these issues.

1. Would the Agency consider a less rigid application of the 50-day time target for stipulated elections based on widespread complaints that some Regional Directors rigidly adhere to the target without regard to the desires of the parties?

Response: The time target for elections is a median goal, not a rigid rule. Our data shows that all Regional Directors have at times exercised their discretion to exceed the target. Moreover, we can and have corrected abuses of that discretion when they are brought to our attention. At the same time, we will not require Regional Directors to approve every date mutually agreed upon by the parties, as the Directors must also consider the public interest in speedy processing of representation proceedings.

2. What is the policy of the General Counsel with regard to regions soliciting withdrawal and refiling of charges to meet time targets? There seems to have been a resurgence of this practice as, for example, one Committee member has on four occasions been requested to withdraw a charge and then refile.

Response: Our policy is to absolutely forbid solicited withdrawals to meet our time goals. However, we do require charging parties to come forward promptly with evidence in support of a charge. In the event of a delay in presenting evidence without good cause, we will remind them that their charge will be dismissed if they do not either present evidence or submit a withdrawal request by a certain date.

3. The Committee requests clarification of the Board's policy on the use of its facsimile machines.

Response: The Rules Committee has completed a study of the use of facsimile machines and has submitted a recommendation. The views of the Regional Directors also have been received. We in headquarters need to review these recommendations and will circulate a proposal to the Committee as soon as we have done so.

4. Will the agency reconsider its policy of prohibiting the filing of responsive briefs?

Response: The Board is more favorably disposed than in the past to act on this recommendation. First, however, there must be discussions with the General Counsel about the matter. There remains a real concern about the impact this proposal might have on field operations. Any rule which might emerge would have to place severe time and page limitations on reply briefs.

5. Can parties be told when a case is sent to the Advice Branch in Washington, and can they be notified, preferably in writing, of the issues being submitted? Further, are cases ever delayed in the Advice Branch to favor the tactical position of one of the parties?

Response: Present policy requires Regional Offices to notify parties when a case is submitted to Advice. Written instructions to this effect will issue and also will be placed in the Casehandling Manual. We are favorably disposed to the suggestion that notice of the submission and of the issues submitted be sent in writing, but wish to consult with the Regional Directors before deciding that question.

Dispositions in Advice cases are never delayed for tactical reasons. Because these cases present very difficult issues, we must spend the time necessary to consider and decide these issues. While the resulting delay in resolution may coincidentally favor one party or another, that is never the reason for the delay.

6. What is the status of the proposal to prohibit the General Counsel from unilaterally changing the hearing dates in a ULP case prior to the scheduled hearing?

Response: The proposal was implemented, with a minor modification, by a December 13, 1989, amendment to Section 102.16 of the Board's Rules and Regulations.

7. Is it the policy of the Agency to permit complaints to issue without first attempting to contact the respondent with respect to settlement, or to include in a complaint issues not raised in settlement discussions?

Response: Our policy is to provide ample opportunities for settlement. No Regional Director would intentionally issue a complaint without first having attempted to settle the case. However, once settlement discussions have been undertaken, Regional Directors need discretion in deciding whether and when the discussions are proving fruitless.

Comments from the floor suggest that Committee members are more concerned with the premature breakdown of settlement discussions due to strict adherence to time targets than with the absence of any discussions. We stated that we would talk with the Regional Directors about redoubling efforts to settle cases in light of the recent upturn in case intake.

8. Has there been a change in policy with respect to Board agents contacting company supervisors directly when the company is not cooperating in an investigation? What is the policy when a supervisor or agent requests that employer counsel not be present during an interview? Finally, what is the agency's policy with regard to noting in a file that a party is "not cooperating" when the party will submit position statements but not give affidavits?

Response: The agency's policy on contacting supervisors or agents of a respondent without notifying company counsel is fully set forth in Section 10056.6 of the ULP Casehandling Manual. Even when a respondent is not cooperating, our policy is not to initiate contact with managers and supervisors to obtain statements.

There are several operational reasons why a region may note in a file the lack of cooperation by a respondent. Although specific reasons were not presented to the Committee, they include a concern with documentation in the event of a future EAJA claim and the need for internal records to explain why a particular line of investigation was not pursued.

9. Why does the General Counsel oppose requests by charging parties to file briefs or memoranda with the courts in Section 10(j) or 10(l) cases?

Response: We have always opposed giving a charging party full party status in a Section 10(j) or 10(l) proceeding. However, we would not oppose a charging party's request to file an amicus brief, so long as that would not delay the proceeding.

10. Is the agency planning to reach an accommodation with the State of Illinois with regard to the state's law requiring that back pay checks be made payable jointly to the individual and the Illinois Department of Labor?

Response: It has long been the position of the Board that attempts by states to require such joint payments are pre-empted by the Board's federal authority to remedy unfair labor practices. As recently as July 18, 1989, the Board upheld a Regional Director's refusal to accept backpay checks from which unemployment payments had been withheld in accordance with state law. Multiplex, Inc., 9-CA-25606 (unpublished). We have reached accommodations with two states having similar laws, Alabama and Colorado. These states have agreed not to enforce such laws with regard to backpay checks in Board proceedings. We were unable to reach a similar agreement with the State of Illinois, but we understand that the state has abandoned its efforts to apply the state law to the Board's backpay awards. If any of you should encounter difficulties with the state in this respect, contact us so that we can become involved in the matter.

11. Are there circumstances in which a charge filed by a party against itself would be entertained?

Response: The Board or the General Counsel might decline to process a charge filed by a party against itself if the filing were deemed collusive or an abuse of Board processes. See NLRB v. Indiana and Michigan Electric Co., 318 U.S. 9, 17, 18 (1943); Shop-Rite Foods, Inc., 205 NLRB 1076 (1973) (charge filed by employer against itself, based on participation of its supervisors in union organizational campaign, deemed collusive attempt to thwart prompt processing of representation case). On the other hand, there are a number of situations in which it may be entirely appropriate to process a charge filed by a party against itself. See, e.g., Milk Drivers Local 546, 133 NLRB 1314, 1321-1322 (1961) (Section 8(e) charge filed by employer against union based on clause in contract executed by employer with the union). Whether a

particular charge will be deemed collusive is not a question that can be answered in the abstract.

12. Are there oversight procedures to avoid casehandling mistakes? Is something being done to deal with complaints that new agents are slow to investigate charges and/or poorly trained?

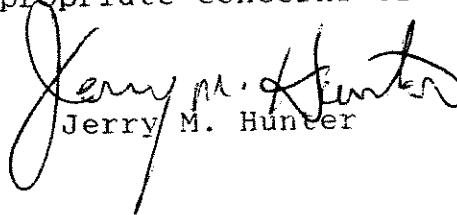
Response: We do have several levels of review in casehandling aimed at avoiding mistakes. While mistakes do occasionally occur, we do our best to keep them to a minimum. Further, we have plans to schedule training sessions on a wide variety of substantive and procedural issues. We are planning not only training sessions for new staff but also refresher courses for our experienced employees.

Members of the Bar must be patient with new staff members. It is not realistic to expect them to handle cases as expeditiously as seasoned veterans, and any attempt by them to work too fast likely would lead to further complaints about the quality of casehandling.

13. What can be done to monitor court reporters to insure that their services are satisfactory?

Response: While the agency does not employ its own court reporters, we do review complaints lodged regarding the reporting companies with whom we have contracts. On occasion, contracts have been cancelled due to poor performance. Therefore, if you have any specific complaints, it is important that you bring them to our attention.

The relative lack of serious problems raised by the ABA committee is an indication of general satisfaction with the way the Office of the General Counsel and particularly the Regional Offices are operating -- a real credit to this Agency's field staff. Again, I invite your comments with respect to any of the matters discussed in this report. Since our relationship with the ABA Committee is a continuing one, I will not hesitate to pass on to the Committee appropriate concerns of the Directors.


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